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SUPREME COURT, U.S.

No. 06-1209

In The Supreme Court of the United States

JOHN WASHINGTON HIGHTOWER,

Petitioner,

v.

WILLIAM TERRY, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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QUESTIONS PRESENTED

1.

Whether Petitioner's mere disagreement with the post-remand decision of the Eleventh Circuit distinguishing the instant case from the case of *Miller-El v. Dretke*, 545 U.S. 231 (2005), fails to warrant the granting of this petition for a writ of certiorari?

2.

Whether the Eleventh Circuit's proper consideration of this Court's decision in *Miller-El v. Dretke*, 545 U.S. 231 (2005), in the context of the procedural history of this case and particularly in light of Petitioner's attempt to raise arguments he did not raise on direct appeal to the Georgia Supreme Court, fails to present a question warranting this Court's exercise of its certiorari jurisdiction?

3.

Whether Petitioner has failed to establish a "split in the circuits" which would warrant the granting of this writ of certiorari in this case where Petitioner is raising a new *Batson* argument and where the procedural posture of this case and the relevant facts are clearly distinguishable from those presented to this Court in *Miller-El v. Dretke*, 545 U.S. 231 (2005)?

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BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, John Washington Hightower, was tried in the Superior Court of Baldwin County, Georgia, for three counts of malice murder for the July 12, 1987 shooting deaths of Dorothy Hightower, Petitioner's wife, and Dorothy's daughters, Sandra and Evelyn Reaves. A change of venue was granted and Petitioner's trial took place in the Superior Court of Morgan County, Georgia.

Petitioner's trial began on April 28, 1988. During the voir dire proceedings, the prosecutor used only seven of his authorized ten peremptory strikes, while using six of those strikes to strike black prospective jurors.[1] Petitioner's trial counsel made a motion pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), alleging that the prosecutor had utilized his strikes against black jurors in a way that raised an inference that the prosecutor excluded jurors based on their race. (Trial transcript, p. 615).[2]

Petitioner's trial counsel also alleged that the prosecutor

> has in the past shown a bent and scheme to keep down the low number of blacks on either the grand jury or regular panels. We would state that this was the bent of mind and the type of thing that Mr. Briley is doing at this time. He

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[1] *See Hightower v. State*, 259 Ga. 770, 773 (1989) and *Hightower v. Schofield*, 365 F.3d 1008, 1031 (11th Cir. 2004) (*Hightower I*).

[2] References to the transcript of Petitioner's trial, which took place from April 28 – May 4, 1988, are hereinafter referred to by "T," followed by the appropriate page number.

> has purposely excluded blacks so that Mr. Hightower will not get a fair and impartial hearing on this case and this matter.

(T. 615-616). Trial counsel also argued that the prosecutor's use of his jury strikes violated Petitioner's due process rights. (T. 617).

The prosecutor responded to Petitioner's *Batson* motion by stating that he had used only seven of his ten peremptory strikes and that six of these seven strikes used were against black prospective jurors. The prosecutor also noted that the defense had used seventeen strikes, striking fourteen white prospective jurors and two black prospective jurors. (T. 617). The prosecutor responded and specifically stated that, "we have not struck any black jurors in this case because they were black." (T. 619).

The prosecutor gave the following explanations of his reasons for striking individual jurors:

As to Ricky Thomas, a black male, the prosecutor stated that he struck Mr. Thomas because Mr. Thomas' father was convicted of murdering his mother when the prospective juror was eight years old and Mr. Thomas might identify Petitioner's case with his father's case. (T. 619). The trial court found that this strike was not race-related. (T. 620).

As to Lucious Boswell, a black male, the prosecutor stated that he struck Mr. Boswell because he had prosecuted Mr. Boswell's brother-in-law, Walter Davis, for trafficking cocaine. The prosecutor also noted Mr. Boswell's response during voir dire questioning, that people who killed three people should not get the death penalty but should work it out in prison. (T. 620). The trial court

held that the state had articulated a not race-related reason for striking this juror. (T. 620).

As to Mattie Pearl Harris, a black female, the prosecutor stated that Ms. Harris had expressed uncertainty concerning her stance on the death penalty; her daughter had been convicted for drugs and she had two-year-old twins that she needed to take care of because her daughter was in prison. Ms. Harris also stated during voir dire that if the defendant killed three people, this meant he was sick and needed help. (T. 621). The trial court ruled that the reasons for striking this juror were not race-related. (T. 621).

As to Norman Jonathan Mack, a black male, the prosecutor stated that this juror had contradicted himself on the death penalty by first saying that he was conscientiously opposed to it, then he was in favor of it, and then he was conscientiously opposed to the death penalty under some circumstances. (T. 621-622). The trial court ruled that the reasons for striking this juror were not race-related. (T. 622).

As to Kelly J. Randall, a white female, the prosecutor stated that this juror's uncle was shot and killed by police and that the prosecutor investigated the case. The trial court ruled that the reasons for striking this juror were not race-related. (T. 622).

As to Thelma Butler, a black female, the prosecutor stated that this juror was the sister of the wife of Gerald Veasley, whom the prosecutor had prosecuted and that Mr. Veasley had received a 20-year sentence, which was later reduced to 12 years. The trial court ruled that the reasons for striking this juror were not race-related. (T. 623).

As to Emerson Davis, Jr., a black male, the prosecutor stated that this juror was somewhat opposed to the death penalty. The trial court ruled that the reasons for striking this juror were not race-related. (T. 623-624).

As to alternate juror Gerald Bonner Smith, a white female, the prosecutor stated that this juror was in favor of the death penalty if it fit the crime, but it did not look like she was real sure of it. Juror Smith's expressions were that she did not really know how she felt about it. The trial court ruled that the reasons for striking this juror were not race-related. (T. 624).

As to alternate juror Lynette Davis, a black female, the prosecutor stated that the prosecutor had just convicted her uncle of burglary; that she stated she was against the death penalty, but felt she could impose it under certain circumstances. The trial court ruled that the reasons for striking this juror were not race-related. (T. 625).

The overall ruling by the trial court on Petitioner's *Batson* challenge was that the defendant had failed to establish a *prima facie* case of discrimination on the part of the district attorney. The trial court specifically found that "as to each individual strike, the State had presented an articulable nonrace (sic) related reason for striking each prospective juror." (T. 626).

On May 4, 1988, Petitioner was found guilty on all three counts of murder and received the death penalty. The jury's recommendation of death was based on the following statutory aggravating circumstances: that the murder of Dorothy Hightower was committed while the Petitioner was engaged in the commission of the murder of Evelyn Reaves; that the murder of Sandra Reaves was committed while the Petitioner was engaged in the commission of the murder of Dorothy Hightower; and that the

murder of Evelyn Reaves was committed while the Petitioner was engaged in the commission of the murder of Sandra Reaves. Petitioner's motion for new trial was denied on June 28, 1989.

In Petitioner's brief on direct appeal to the Georgia Supreme Court, Petitioner raised his *Batson* claim as enumeration of error number 22, in which he alleged that, "the trial court erred in overruling Defendant's objection to the District Attorney's using six of seven strikes to eliminate black persons from the jury." (Petitioner/Appellant's Enumerations of Error, p. 4, paragraph 22). Petitioner's direct appeal brief as to his *Batson* claim reads, in its entirety, as follows:

> The District Attorney used six of his seven strikes to eliminate black persons from the jury. (T. 615, et seq.). The defendant is black. Such a disproportionate use of strikes against black jurors is violative of the rule laid down in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986). Explanations as to why jurors were struck cannot overcome this one-sided use of the State's strikes.

(Appellant's Brief on Direct Appeal, pp. 67-68).

The Georgia Supreme Court found that the trial court had correctly rejected Petitioner's claim raised pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), by holding as follows:

> The prosecutor used only seven of his authorized 10 peremptory strikes. He used six of those seven strikes against black prospective jurors. The record shows that at least two black prospective jurors were struck by the defendant after having been accepted by the prosecutor. The prosecutor explained his peremptory challenges. Four of the challenged prospective jurors were

> closely related to persons convicted of serious felonies. The other two were conscientiously opposed to the death penalty, although not to the extent they were excused for cause. The trial court found that the prosecutor had articulated legitimate non-racial reasons for his challenges. Even assuming the defendant made out a prima facie case, cf. *Childs v. State*, 257 Ga. 243 (21) (357 SE2d 48) (1987), the trial court's determination is not clearly erroneous.

Hightower v. State, 259 Ga. 770, 773 (1989).

In his motion for reconsideration of the Georgia Supreme Court opinion, filed on December 6, 1989, Petitioner did not argue his *Batson* claim. Petitioner's motion for reconsideration was denied by the Georgia Supreme Court on December 22, 1989.

Petitioner filed a petition for a writ of certiorari in this Court on July 20, 1990. This Court denied the petition for a writ of certiorari on October 1, 1990, in *Hightower v. Georgia*, 498 U.S. 882 (1990), and denied rehearing on November 26, 1990, in *Hightower v. Georgia*, 498 U.S. 995 (1990).

Petitioner filed a state habeas corpus petition in the Superior Court of Butts County on July 9, 1991, and filed an amended petition for state habeas corpus relief on January 25, 1993. In his state habeas corpus petition, Petitioner raised his *Batson* claim, but the state habeas corpus court declined to review the claim based on state law, as contained in such cases as *Gunter v. Hickman*, 256 Ga. 316 (1986), holding that claims litigated on direct appeal cannot be relitigated in state habeas corpus proceedings. A state habeas corpus hearing was conducted in the Superior Court of Butts County on January 25, 1993.

Petitioner was denied state habeas corpus relief on January 18, 1994.

Petitioner filed an application for a certificate of probable cause to appeal from the denial of state habeas corpus relief in the Supreme Court of Georgia on January 18, 1994. The Supreme Court of Georgia denied the application for a certificate of probable cause to appeal on November 3, 1994. Petitioner's motion for reconsideration was denied on December 2, 1994.

Petitioner filed a petition for a writ of certiorari in this Court on April 18, 1995, and the petition was denied on June 26, 1995. *Hightower v. Thomas*, 515 U.S. 1162 (1995). Petitioner's petition for rehearing filed on July 20, 1995, was subsequently denied on September 1, 1995 in *Hightower v. Thomas*, 515 U.S. 1183 (1995).

On November 26, 1996, Petitioner filed an application for a writ of habeas corpus in the United States District Court for the Middle District of Georgia, Athens Division. In addition to filing a Response to Petitioner's petition for writ of habeas corpus on March 13, 1997, Respondent also filed a Notice of Filing of various documents to be utilized by the federal habeas corpus court in considering Petitioner's amended petition for a writ of habeas corpus.

On August 6, 1999, the federal district court denied Petitioner federal habeas corpus relief on his *Batson* claim by stating the following (as quoted in the Eleventh Circuit's opinion in *Hightower II, infra*):

> Petitioner has easily satisfied the first two prongs of his prima facie burden under *Batson*; the only disputed issue is whether the totality of the circumstances raised an inference that the prosecutor peremptorily struck certain jurors

> because of their race. The trial court, having the best opportunity to view the prosecutor's demeanor and determine his credibility, found the prosecutor's explanations to be credible. The trial court also found there to be a race-neutral basis for all of the prosecutor's peremptory challenges of black prospective jurors. The Georgia Supreme Court affirmed the trial court's evaluation. This Court cannot say that the Georgia Supreme Court's determination was unreasonable or contrary to Batson or any other Supreme Court case within the meaning of the [Antiterrorism and Effective Death Penalty Act]. Accordingly, Petitioner is not entitled to relief on this basis.

Hightower v. Terry, 459 F.3d 1067, 1070-1071 (11th Cir. 2006) (*Hightower II*).

As also noted by the Eleventh Circuit in *Hightower II*,

> In determining whether the Georgia Supreme Court's rejection of Hightower's *Batson* claim should be sustained, the district court focused on what was before the Georgia Supreme Court. In other words, to the extent that Hightower's petition contained an argument that Hightower did not present to that court, the district court ignored the argument.

Hightower v. Terry, 459 F.3d 1067, 1071 n.7 (11th Cir. 2006).

Petitioner's motion to alter and amend judgment was denied on September 27, 1999. On January 23, 2001, the federal habeas corpus court granted Petitioner's motion for a certificate of appealability.

On April 12, 2004, the Eleventh Circuit affirmed the federal habeas corpus court's denial of federal habeas corpus relief. In affirming the denial of federal habeas

corpus relief as to Petitioner's *Batson* claim, the Eleventh Circuit emphasized that its review was constrained by 28 U.S.C. § 2254. *See Hightower v. Schofield*, 365 F.3d 1008, 1035 (11th Cir. 2004) (*Hightower I*). On May 3, 2004, Petitioner filed a petition for rehearing *en banc*, which was denied by the Eleventh Circuit on June 4, 2004.

On June 20, 2005, this Court granted Petitioner's petition for writ of certiorari and remanded the case to the Eleventh Circuit Court of Appeals for further consideration in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005) (*Miller-El II*).

On July 27, 2005, the Eleventh Circuit Court directed the parties to file letter briefs "commenting upon the application of *Miller-El v. Dretke*, 545 U.S. ___ 2005 to the above case." Petitioner and Respondent filed simultaneous letter briefs on September 16, 2005.

On August 8, 2006, the Eleventh Circuit issued an opinion holding that *Miller-El II* did not change the circuit court's disposition of Petitioner's *Batson* claim and reinstating its prior opinion. The Eleventh Circuit concluded that, "*Miller-El* does not counsel a decision contrary [to] the one we reached in *Hightower v. Schofield*, and therefore [we] adhere to that decision." *Hightower v. Terry*, 459 F.3d 1067, 1069 (11th Cir. 2006). The Eleventh Circuit specifically found the following: "Why *Miller-El* does not control our decision becomes clear when one considers how *Miller-El* reached the Supreme Court and how *Hightower v. Schofield* came to us." *Hightower v. Terry*, 459 F.3d 1067, 1069 (11th Cir. 2006).

The Eleventh Circuit reaffirmed its prior opinion affirming the denial of federal habeas corpus relief as to Petitioner's *Batson* claim by concluding that, "We have considered *Miller-El* in the context of the instant case. We

conclude that it does not change our disposition of Hightower's Batson claim. Our opinion in *Hightower v. Schofield* is accordingly reinstated." *Hightower v. Terry*, 459 F.3d 1067, 1072 (11th Cir. 2006) (*Hightower II*).

Thereafter, Petitioner's petition for rehearing was denied by the Eleventh Circuit on September 11, 2006. It is from the Eleventh Circuit's decision on remand from this Court which is the subject of the instant petition for a writ of certiorari.

PART TWO

STATEMENT OF THE FACTS

In reviewing Petitioner's case on direct appeal, the Supreme Court of Georgia summarized the evidence presented in Petitioner's case as follows:

> The defendant was married to Dorothy Hightower. Her brother stopped by their home early in the morning of July 12, 1987, to pick up his daughter. Dorothy Hightower's car was gone. The brother entered the home and found that Dorothy Hightower and her two daughters, Evelyn and Sandra Reaves, had been shot. Evelyn Reaves was still alive, but died two days later. Sandra Reaves and Dorothy Hightower were dead. The brother's daughter was unharmed.
>
> Two and one-half hours later, the defendant was arrested driving his wife's car. Inside the car was a bloody handgun. He confessed later that morning. He told police that he and his wife had been having marital problems, and he had purchased the murder weapon the day before. He hid it under his pillow until 3:00 a.m., when he shot his

> wife. He then went to the bedroom occupied by his stepdaughter Sandra Reaves. She got out of bed, but then lay back down. He shot her in the head. Evelyn Reaves tried to leave the house, but the defendant caught her and shot her three times. He stated that he did not harm his niece because he "didn't have any problems with the baby."

Hightower v. State, 259 Ga. 770, 771 (1989).

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONER'S MERE DISAGREEMENT WITH THE POST-REMAND DECISION OF THE ELEVENTH CIRCUIT PROPERLY DISTINGUISHING THIS CASE FROM *MILLER-EL V. DRETKE*, 545 U.S. 231 (2005), AND CORRECTLY APPLYING WELL-SETTLED PROCEDURAL DEFAULT PRINCIPLES TO BAR LITIGATION OF PETITIONER'S NEWLY-RAISED *BATSON* ARGUMENTS, FAILS TO WARRANT THE GRANTING OF THIS PETITION FOR A WRIT OF CERTIORARI.

An examination of the Eleventh Circuit's opinion pursuant to this Court's remand, reveals that the Eleventh Circuit fully complied with this Court's direction to reexamine Petitioner's *Batson* claim in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005) (referred to by Petitioner as *Miller-El II*), and thus, the Eleventh Circuit's decision to reinstate its prior opinion in *Hightower v. Schofield*, 365 F.3d 1008 (11th Cir. 2004) (*Hightower I*), does not warrant certiorari review by this Court.

Although Petitioner couches his petition for certiorari in terms of the alleged non-compliance by the Eleventh Circuit with this Court's remand order, it is clear that Petitioner merely disagrees with the results of the Eleventh Circuit's properly conducted review of Petitioner's *Batson* claim. The fact-specific application of *Batson* and *Miller-El II* to the facts of Petitioner's case does not authorize the granting of certiorari, pursuant to this Court's precedent holding that, "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). *See also Texas v. Mead*, 465 U.S. 1041 (1984).

This Court also reiterated in *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974), that certiorari review is discretionary and "depends on numerous factors other than the perceived correctness of the judgment we are asked to review." Petitioner's disagreement with the Eleventh Circuit's ultimate conclusion cannot be equated with alleged non-compliance with this Court's remand order and does not authorize the granting of certiorari review.

The fact that Petitioner disagrees with the Eleventh Circuit's majority opinion, while agreeing with the minority opinion (Petition, subheading 8, p. 18-22), also fails to establish that the Eleventh Circuit's review made pursuant to *Miller-El II* was flawed. In *Hightower II*, the Eleventh Circuit expressly stated, "We have considered *Miller-El* in the context of the instant case." *Hightower v. Terry*, 459 F.3d 1067, 1072 (11th Cir. 2006).

The Eleventh Circuit reviewed Petitioner's case based on a complete trial record of the voir dire proceedings, and reviewed the *Batson* claim utilizing the same factors this Court found to be significant in *Miller-El II*. In *Miller-El v.*

Dretke, 545 U.S. 231 (2005), this Court found that *Miller-El* was entitled to prevail on his *Batson* claim, based on this Court's conclusion that under the specific facts of that case, *Miller-El* had established that the prosecution used peremptory challenges to exclude black jurors on the basis of race. *Miller-El v. Dretke*, 545 U.S. 231, 266-267 (2005).[3]

Petitioner claims that the Eleventh Circuit found *Miller-El II* to be irrelevant and that the Eleventh Circuit ignored this Court's findings in *Miller-El II*. However, an impartial review of the Eleventh Circuit's decision clearly shows that in applying *Miller-El II*, the Eleventh Circuit correctly determined that the Petitioner's case was distinguishable on its facts from *Miller-El II*. Since any *Batson* inquiry, even one which is conducted post-*Miller-El II*, is of necessity, a fact-based inquiry, the distinguishing factors between *Miller-El II* and Petitioner's case, which were noted by the Eleventh Circuit, are significant and demonstrate an appropriate review pursuant to this Court's remand.

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[3] This Court found the following facts to be significant: (1) that 10 of 11 of the qualified black panel members on the panel were peremptorily struck; (2) that two of the qualified black venire panel members were "ostensibly acceptable to prosecutors seeking a death verdict"; (3) that "the prosecution's chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion"; (4) "The State's attempts to explain the prosecutor's questioning of particular witnesses on nonracial grounds fit the evidence less well than the racially discriminatory hypothesis"; and (5) "the strikes correlate with no fact as well as they correlate with race, and they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State."

Petitioner ignores this Court's language in *Miller-El* recognizing that a *Batson* analysis continues to involve a consideration of the totality of the specific circumstances of the case, a consideration of whether the trial court's observation of the prosecutor's credibility and demeanor is entitled to deference and a determination of whether pretextual reasons for striking African-American jurors were given by the prosecutor. *See Miller-El v. Dretke*, 545 U.S. 231, 266-267 (2005) and *Hightower v. Schofield*, 365 F.3d 1008, 1034-1035 (11th Cir. 2004) (*Hightower I*), relying on *Batson*, 476 U.S. at 98 and *Miller-El v. Cockrell*, 537 U.S. 322, 338-339 (2003). The Eleventh Circuit in both *Hightower I* and *II* properly considered the totality of the circumstances, including the procedural history of Petitioner's case, in reviewing Petitioner's *Batson* claim and ultimately, in *Hightower II*, reinstating its opinion affirming the denial of federal habeas corpus relief as to the *Batson* claim.

Petitioner complains that the Eleventh Circuit found *Miller-El II* to be irrelevant because *Miller-El* was able to utilize evidence produced during the federal habeas corpus proceeding, whereas Petitioner was "limited" to the evidence presented during state court proceedings. However, in seeking certiorari review on his current *Batson* claim, Petitioner neglects to acknowledge that the he failed to raise his current *Batson* claims in the state courts, thus limiting federal evidentiary development of his current *Batson* claim due to his own actions. As a result, Petitioner implicitly concedes that his *Batson* claim is distinguishable based on a review of its procedural history, from the underlying procedural history of the *Batson* claim considered by this Court in *Miller-El II*.

There is no support for Petitioner's assertion (Petition, p. 23), that the Eleventh Circuit ignored both *Miller-El*

and the state court record in reinstating its opinion in *Hightower I*. In his petition, Petitioner contradicts his assertion that the Eleventh Circuit did not perform the proper post-*Miller-El II/Batson* analysis, as Petitioner even lists the three bases for the Eleventh Circuit's rejection of Petitioner's *Batson* claim. (Petition, pp. 16-18). While Petitioner appears to acknowledge that *Batson* inquiries, which are conducted subsequent to *Miller-El*, are still comprised of the same elements, he claims that the Eleventh Circuit allegedly failed to properly review Petitioner's *Batson* claim by purportedly "conflating" the second and third steps of a *Batson* inquiry.[4]

A review of the Eleventh Circuit decision contradicts Petitioner's assertion, as it is clear that the Eleventh Circuit properly exercised its limited role as a reviewing court examining a state trial court decision,[5] the Eleventh Circuit merely found that the trial court's ruling on Petitioner's *Batson* motion explicitly rejected the second prong of *Batson* and implicitly rejected the third prong of *Batson*. In fact, the Eleventh Circuit squarely rejected the position taken in Judge Wilson's dissenting opinion,[6] which Petitioner

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[4] In *Hightower II*, the Eleventh Circuit explicitly acknowledged *Batson*'s three-pronged test. *Hightower v. Terry*, 459 F.3d 1067, 1069, n.3 (11th Cir. 2006).

[5] "The Georgia Supreme Court rejected each of his Batson claims on direct appeal. *Hightower v. State*, 386 S.E.2d 506, 512 (Ga. 1989). Thus, our review is again limited by 28 U.S.C. § 2254(d). We find this claim to be without merit." *Hightower v. Schofield*, 365 F.3d 1008, 1029 (11th Cir. 2004) (*Hightower I*).

[6] The majority opinion acknowledged this assertion made in the dissenting opinion but nevertheless found, "The dissent fails to recognize, however, that a trial court's dispositive ruling may contain implicit findings, which, though unstated, are necessary to that ruling. *See United States v. $242,484.00 in United States Currency*, 389 F.3d

(Continued on following page)

has adopted herein, that the trial court and the Georgia Supreme Court failed to apply the third prong of *Batson*.[7] The Eleventh Circuit concluded that a review of the record showed "that the trial court implicitly found the prosecutor's race-neutral explanations to be credible, thereby completing step three of the *Batson* inquiry." *Hightower v. Terry*, 459 F.3d 1067, 1072 (11th Cir. 2006).

The Eleventh Circuit coupled this finding with its prior conclusion, which had also been reached by the federal habeas corpus court that, "'Hightower never provided the [state trial] court with any evidence tending to discredit the persuasiveness of the prosecutor's stated reasons for striking black jurors.' *Hightower v. Schofield*, 365 F.3d at 1035." *Hightower v. Terry*, 459 F.3d 1067, 1071 (11th Cir. 2006).

Thus, in light of the lack of evidence to discredit the prosecutor's stated reasons for striking the jurors, accompanied by the finding, implicit in the trial court's acceptance of the prosecutor's explanations for his strikes as

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1149, 1154 (11th Cir. 2004) (*en banc*)." *Hightower v. Terry*, 459 F.3d 1067, 1072 n.9 (11th Cir. 2006).

[7] The Eleventh Circuit then concluded that,

> In this case, the trial court, after assuming that Hightower had made out a prima facie case of racial discrimination, expressly found that the prosecutor had provided an "articulable, non-race related reason" for each strike, and overruled Hightower's Batson objection. The trial court's overruling of Hightower's Batson objection would have defied logic had the court disbelieved the prosecutor's race-neutral explanations. We may therefore make "the common sense judgment" – in light of defense counsel's failure to rebut the prosecutor's explanations and the trial court's ultimate ruling – that the trial court implicitly found the prosecutor's race-neutral explanations to be credible, thereby completing step three of the *Batson* inquiry."

Id.

being race-neutral, the Eleventh Circuit found that the third prong of *Batson* had not been established.

Contrary to Petitioner's assertions, the record shows that the Eleventh Circuit clearly considered each of the three prongs of *Batson* based on the trial record and since there is no basis for Petitioner's assertion that *Batson*'s third prong was ignored by the Eleventh Circuit, this cannot serve as a basis for granting certiorari in this case. This Court should decline to grant certiorari simply to review the Eleventh Circuit's proper fact-specific *Batson* analysis conducted in a post-*Miller El II* case.

II. PETITIONER HAS FAILED TO ESTABLISH A CONFLICT AMONG THE CIRCUITS REGARDING "POST-*MILLER-EL*" *BATSON* CLAIMS WHICH WOULD AUTHORIZE THE GRANTING OF THIS PETITION FOR CERTIORARI.

Petitioner argues that this Court should grant certiorari based on an alleged conflict between the Ninth and Eleventh Circuits in reviewing "post-*Miller-El II*" claims, relying on the decision of *Boyd v. Newland*, 467 F.3d 1139 (9th Cir. 2006), as purportedly supporting this "conflict." Petitioner argues that the Ninth Circuit in *Boyd* reversed its original decision on a *Batson* claim, made pursuant to *Miller-El I*, due to its reconsideration of the same *Batson* claim using *Miller-El II*. (Petition, p. 23). However, the fact that the Ninth Circuit found that *Miller-El II* compelled a different result on a *Batson* claim in *Boyd v. Newland*, does not establish either a conflict between the Ninth and the Eleventh Circuits, nor does it establish that the Eleventh Circuit did not properly consider *Miller-El II* in reinstating its original opinion concluding that Petitioner had not established his *Batson* claim.

Although the Ninth Circuit in *Boyd* may have stated in *dicta*, that "California courts' view that comparative jury analysis can take place on appeal only when the trial court engaged in such an analysis in the first instance has been called into question,"[8] the Ninth Circuit did not conduct a comparative jury analysis in *Boyd*. The holding of the Ninth Circuit in *Boyd* reads as follows:

> *But we can engage in no comparative juror analysis here, because we do not know what happened during the entirety of the voir dire.* Because we hold that, under the clearly established Supreme Court precedent of *Batson*, comparative juror analysis is an important tool that courts should utilize on appeal when assessing a defendant's plausible *Batson* claim, we also must conclude *that all defendants, including those who are indigent, have a right to have access to the tools which would enable them to develop their plausible* Batson *claims through comparative juror analysis.*

Boyd v. Newland, 467 F.3d 1139, 1147 (9th Cir. 2006) (emphasis supplied).

More importantly for purposes of Petitioner's contentions, *Boyd* did not hold that under *Miller-El II*, comparative jury analysis is compelled during appellate review of a *Batson* claim. An examination of the opinion in *Boyd* shows that the Ninth Circuit relied on the Fifth Circuit decision in *Murphy v. Dretke*, 416 F.3d 427, 439 (5th Cir. 2005), "stating that in *Miller-El II*, the Court did not announce 'any new elements or criteria for determining a *Batson* claim' but merely applied *Batson* in the circumstances of that particular case." *Boyd v. Newland*, 467 F.3d

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[8] *Boyd v. Newland*, 467 F.3d 1139, 1149 (9th Cir. 2006).

1139, 1146 (9th Cir. 2006). Therefore, *Boyd* did not hold that *Miller-El II* created new criteria for a *Batson* analysis.

Additionally, the record in *Boyd* stands in stark contrast to the record in Petitioner's case where the entirety of the voir dire proceedings was before the Georgia Supreme Court and were reviewed in detail by the Eleventh Circuit in *Hightower v. Schofield*, 365 F.3d 1008, 1029-1031 (11th Cir. 2004) (*Hightower I*) ("We begin our analysis of this claim by describing the process by which the jury was selected."). *Compare Boyd v. Newland*, 467 F.3d 1139, 1142 (9th Cir. 2006) ("Petitioner filed three requests to supplement the record to include the entire voir dire transcript.").

The record in *Boyd* is also distinguishable from the record in Petitioner's case, because in *Boyd*, the trial court found no *prima facie* case of jury discrimination to have been established,[9] whereas in Petitioner's case, the trial court assumed a *prima facie* case to have been shown.[10]

Petitioner argues, citing the question presented in the petition for a writ of certiorari filed in this Court on

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[9] "At the time of the disputed peremptory challenge, another African-American potential juror had been stricken for cause; two other African-Americans remained as potential jurors; and the prosecutor had used two other peremptory challenges on non-African-American jurors. The trial court denied the motion, finding that Petitioner's "showing falls short of showing a prima facie case" of racial bias in the prosecutor's use of the peremptory challenge." *Boyd v. Newland*, 467 F.3d 1139, 1142 (9th Cir. 2006).

[10] "In this case, the trial court, after assuming that Hightower had made out a prima facie case of racial discrimination, expressly found that the prosecutor had provided an 'articulable, nonrace related reason' for each strike, and overruled Hightower's *Batson* objection." *Hightower v. Terry*, 459 F.3d 1067, 1072 (11th Cir. 2006).

January 24, 2007 in *Boyd*, that "*Boyd* and *Hightower II* conflict." (Petition, p. 24). Petitioner contends that under the third prong of a *Batson* analysis, comparative jury analysis is "required in federal habeas corpus proceedings," even when it was not requested in the state courts. (Petition, p. 24). However, the express holding of *Boyd* is as follows:

> The California courts denied a *Batson* motion made by Petitioner Mobassa Boyd and denied his request for a free transcript of the entire voir dire for use on appeal. We must ask whether those rulings were contrary to, or unreasonably applied, clearly established federal law as determined by the Supreme Court. In an earlier decision in this case, we answered "no." *Boyd v. Newland*, 393 F.3d 1008 (9th Cir. 2004). In response to a petition for rehearing and in light of recent Supreme Court cases clarifying *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), we conclude that our earlier analysis was flawed. We now hold that the California appellate courts violated clearly established federal law by denying Petitioner's habeas petition because, without an entire voir dire transcript, those courts could not evaluate the relevant circumstances surrounding the contested strike, as *Batson* requires. In that respect we reverse and remand with instructions to grant the petition for a writ of habeas corpus.

Boyd v. Newland, 467 F.3d 1139, 1142 (9th Cir. 2006). Therefore, Respondent submits that both the procedural history of *Boyd* and Petitioner's case, as well as the records in these cases are easily distinguishable and prohibit any "conflict" which would authorize the granting of certiorari. It seems axiomatic that in order to establish a

"conflict" sufficient to authorize the granting of certiorari, two jurisdictions must apply the "same rule" to the "same facts" on the "same record" but with different results. Petitioner's case and *Boyd* do not even involve the "same rule" except insofar as they both address *Batson* claims, and are clearly distinguishable based on the record, the ruling of the trial court and the facts of the cases.

Boyd, a California case, addressing California legal standards, cannot stand for the proposition that comparative jury analysis is required on direct appeal under Georgia law, nor that a comparative jury analysis claim under *Batson* cannot be procedurally defaulted under Georgia procedural default rules.

Petitioner describes the Eleventh Circuit's opinion in *Hightower II*, relying on this Court's decision in *Batson* and *Miller El*, as "a magical post-remand-procedural-default-escape-valve from *Miller El II*." (Petition, p. 23). However, despite Petitioner's objections to the Eleventh Circuit's consideration of procedural default in the context of its review of Petitioner's *Batson* claim, Petitioner has failed to cite any authority for the proposition that the procedural default doctrine is inapplicable to *Batson* claims, except to allege that the finding of procedural default conflicts with *Boyd* in which there was never a complete record on which to review Boyd's *Batson* claims.

Whether California courts determine that a comparative jury analysis forms a part of any *Batson* analysis and whether this Court grants certiorari to consider whether a state court declines to undertake a comparative analysis for the first time on appeal (Petition, p. 24, n.14), does not establish a conflict with the disposition of Petitioner's *Batson* claim made by the Eleventh Circuit in *Hightower*

II, particularly where the record in the instant case shows that the comparative jury claim was not even presented to the Georgia Supreme Court on direct appeal. Therefore, *Boyd* and *Hightower II*, do not "conflict," (Petition, p. 24), so as to authorize the granting of certiorari in this case.

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Respondent prays that this Court decline to exercise its certiorari jurisdiction and deny the instant petition for a writ of certiorari.

Respectfully submitted,

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